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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
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| 10/032,781 | 12/28/2001 | Gerald B. Cotten | KFHI-101 | 7182 |
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| HOLLANDER LAW FIRM, P.L.C. SUITE 305 10300 EATON PLACE FAIRFAX, VA 22030 | | | EXAMINER BECKER, DREW E | |
| | | | ART UNIT | PAPER NUMBER |
| | | | 1761 | |

DATE MAILED: 02/03/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/032,781

Applicant(s)

COTTEN ET AL.

Examiner

Drew E Becker

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 12 November 2002.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-36 is/are pending in the application.
- 4a) Of the above claim(s) 27-36 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-26 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. §§ 119 and 120

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
* See the attached detailed Office action for a list of the certified copies not received.
- 13) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application) since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.
a) ☐ The translation of the foreign language provisional application has been received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121 since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s) _____
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ 6) ☐ Other: _____

DETAILED ACTION

Election/Restrictions

1. Restriction to one of the following inventions is required under 35 U.S.C. 121:
 - I. Claims 1-26, drawn to a method of producing dairy-based confections, classified in class 426, subclass 576.
 - II. Claims 27-36, drawn to an apparatus, classified in class 99, subclass 452.

The inventions are distinct, each from the other because of the following reasons:

2. Inventions I and II are related as process and apparatus for its practice. The inventions are distinct if it can be shown that either: (1) the process as claimed can be practiced by another materially different apparatus or by hand, or (2) the apparatus as claimed can be used to practice another and materially different process. (MPEP § 806.05(e)). In this case the apparatus of group II can be used to practice another and materially different process, for instance heating non-dairy foods.
3. Because these inventions are distinct for the reasons given above and have acquired a separate status in the art as shown by their different classification, restriction for examination purposes as indicated is proper.
4. Because these inventions are distinct for the reasons given above and the search required for Group I is not required for Group II, restriction for examination purposes as indicated is proper.
5. During a telephone conversation with Barry Hollander on January 26, 2004 a provisional election was made with traverse to prosecute the invention of group I, claims 1-26. Affirmation of this election must be made by applicant in replying to this Office

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action. Claims 27-36 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

6. Applicant is reminded that upon the cancellation of claims to a non-elected invention, the inventorship must be amended in compliance with 37 CFR 1.48(b) if one or more of the currently named inventors is no longer an inventor of at least one claim remaining in the application. Any amendment of inventorship must be accompanied by a request under 37 CFR 1.48(b) and by the fee required under 37 CFR 1.17(i).

Claim Rejections - 35 USC § 112

7. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

8. Claim 14 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. Claim 14 recites "said dairy component comprises... cocoa". It is not clear how cocoa can be considered a dairy product. Applicant's specification recites on page 23: "Cocoa is defined as a mixture of milk or milk solids and cocoa". It is not clear how "cocoa" can be used to define itself.

9. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

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10. Claims 1-26 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

11. Claims 1 and 23 recite "its". It is not clear what "it" is.

Claim Rejections - 35 USC § 102

12. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

13. Claims 1, 3, 7, 12, 14-15, and 18-22 are rejected under 35 U.S.C. 102(b) as being anticipated by Burley [Pat. No. 4,107,347].

Burley teaches a method of making candy by boiling an aqueous sugar composition, admixing a protein-containing dairy component, heating and cooking the mixture, inherently increasing the solids content by boiling off moisture, cooling the mixture (column 1, lines 28-50), flashing with vacuum (column 2, line 46), the use of 3-30% dairy (column 1, lines 28-50), the dairy component including cream and skim milk powder (column 1, line 57), heating the aqueous sugar to 295°F (column 1, line 30), the aqueous sugar comprising sucrose and corn syrup (column 2, line 34), and the heating inherently occurring at ambient, or atmospheric, pressure.

14. Claims 1-3, 7, 9, 11-12, 14-15, and 17-22 are rejected under 35 U.S.C. 102(b) as being anticipated by Alikonis [Candy Technology].

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Alikonis teaches a method of making chewy candy by boiling an aqueous sugar composition, admixing a protein-containing dairy component, heating and cooking the mixture, inherently increasing the solids content by boiling off moisture, cooling the mixture, the use of 3-30% dairy, the dairy component including butterfat and evaporated milk, pulling, the aqueous sugar comprising sucrose and corn syrup (page 149), the use of butter (page 152), heating at 235°F (page 152), cooking at 237°F (page 152), and the heating inherently occurring at ambient, or atmospheric, pressure.

Claim Rejections - 35 USC § 103

15. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

16. Claim 16 is rejected under 35 U.S.C. 103(a) as being unpatentable over Alikonis. Alikonis teaches the above mentioned concepts. It would have been obvious to one of ordinary skill in the art to use milk at 30-60°F in the method of Alikonis since Alikonis already included the use of butter (page 152) and since butter was commonly stored at refrigerated temperatures such as these.

17. Claims 4-6, 10, and 23-26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Alikonis as applied above, in view of Jackson [Sugar Confectionery Manufacture].

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Alikonis teaches the above mentioned concepts. Alikonis does not teach the use of a plate heat exchanger and the use of gelatin. Jackson teaches the use of a plate heat exchanger (page 180) and the use of gelatin (page 175). It would have been obvious to one of ordinary skill in the art to incorporate the plate heat exchanger and gelatin of Jackson into the method of Alikonis since both are directed to methods of making candies, since Alikonis already included heating and cooking (column 1, lines 28-50), since gelatin was a common component in candies as shown by Jackson (page 175), and since the plate heat exchanger of Jackson possessed advantages such as being more compact, having no moving parts, and easy addition and removal of plates to accommodate different heating conditions and volumes (page 180) as well as continuous production as compared to the batch production of Alikonis.

18. Claims 8 and 13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Alikonis as applied above, in view of Kolar [Pat. No. 3,677,771].

Alikonis teaches the above mentioned concepts. Alikonis does not teach vacuum flashing and a protein content of 0.4-5%. Kolar teaches a method of making caramels by vacuum flashing (column 8, line 1) and a protein content of 3-37% (column 3, line 34). It would have been obvious to one of ordinary skill in the art to incorporate the vacuum flashing and protein content of Kolar into the method of Alikonis since both are directed to methods of making candies, since Alikonis already included flashing, powdered milk, and simply did not mention the protein amount, since the vacuum flashing of Kolar would have provided quicker drying, and since caramels commonly possessed 3-37% protein as shown by Kolar.

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19. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Olney [Pat. No. 3,607,309] and Lynch et al [Pat. No. 5,384,148] teach methods of making confections.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Drew E Becker whose telephone number is 571-272-1396. The examiner can normally be reached on Mon.-Thur. 8am-5pm and every other Fri. 8am-4pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 571-272-0987.



Drew E Becker
Primary Examiner
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